CURRENT SUNSET REVIEW ISSUES AND RECOMMENDATIONS FOR THE MEDICAL BOARD OF CALIFORNIA MAY 1, 2002 HEARING

Recommendations of the Joint Legislative Sunset Review Committee

ISSUE #1: (DEPARTMENT APPOINT AN INDEPENDENT ENFORCEMENT MONITOR TO THE BOARD?) Should the Director of the Department appoint an independent enforcement program monitor to investigate and evaluate the Board's enforcement program?

Recommendation #1: The Director of the Department should appoint an Enforcement Program Monitor to the Board whose duties would include monitoring and evaluating the Medical Board's disciplinary system and reporting their findings and recommendations, as specified, to the Department and the Legislature every six months, beginning on September 1, 2003, with a final report March 1, 2005. The Enforcement Program Monitor should be funded through the Contingent Fund of the Medical Board of California Fund.

Comments: The Department concurred with the JLSRC preliminary recommendation that the Director of the Department should be authorized to appoint an enforcement program monitor to the Medical Board. The Department has found that the use of an enforcement monitor at the Contractors' State License Board has been extremely effective in assisting the Board in improving the overall efficiency of the Board's disciplinary system.

The Board's Monitor would be charged with investigating and evaluating the Board's discipline system and procedures, making its highest priority the reform and reengineering of the Board's enforcement program and operations, including its complaint, investigation, accusation, and settlement policies and practices.

ISSUE #2: (CONTINUE EFFORTS TO DEAL WITH THE HIGH DISSATISFACTION BY COMPLAINANTS?) What should the Board do to deal with the high dissatisfaction rating it still receives by those who file complaints, even though the Board has made significant improvements in communicating with complainants?

Recommendation #2: The Board should continue efforts to improve communication with consumers who file complaints with the Board. It should continue to assess consumer satisfaction with handling of complaints and provide quarterly progress reports to the Department over the next two years.

Comments: As stated above, there is still a high dissatisfaction with the outcome of their particular case, but improvements have been made. About 35% in 2000 were satisfied with overall service provided by the Board, as compared to 24% in 1997. Thirty-five percent is still too low.

The Department concurred with the JLSRC's preliminary recommendation that the Board should continue its ongoing effort to improve communication with consumers who file complaints with the Board. Although the Board's most recent satisfaction survey reflects improvement, the Board should continue to improve its communication with consumers about the status of complaints in a timely fashion.

The Department suggested the Board continue to annually assess consumer satisfaction with Board handling of complaints, and provide quarterly progress reports to the Department over the next two years. This will assist the Department in maintaining its oversight function of the Board.

ISSUE #3: (CHANGE DISCLOSURE REQUIREMENTS AND IMPROVE INFORMATION PROVIDED TO THE PUBLIC?) Should the Board provide more useful and meaningful information to the public regarding the Board and the licensees it regulates?

Recommendation #3*:* The JLSRC believes that the Board's current disclosure policy, including the information available on its web site, does not accurately reflect whether an individual physician has a past history that could very well influence the decision a person may make regarding which physician they choose for their health care. For example, the Board's current web site does not disclose to the public categories of information available, and considered important, by the Board, medical malpractice insurers, HMOs and hospitals for investigation and disciplinary purposes, underwriting purposes, and liability exposure purposes, respectively. As well, even if the Board did disclose the appropriate categories of information, the Board is not currently obtaining information sufficient to make sure that the disclosed information is accurate. Finally, there is confusion as to what extent the Board has to comply with the Public Records Act.

The JLSRC recommends that the Board be required to disclose the categories of information recommended by the Board's sub-committee on disclosure ((1) through (5)):

(1) all physician misdemeanor criminal convictions that have a substantial relationship to the practice of medicine and all other public information that may have an adverse impact on the safe delivery of medical care;

(2) malpractice settlements against a physician with appropriate disclaimers modeled on those used in other states explaining the various reasons why doctors might settle a malpractice action and providing comparative benchmarks showing whether the number of settlements is below average for the doctor's specialty, average, or above average. More

specifically, if three or more malpractice settlements of $30,000 or more, but less than $150,000, are reported in a 10 year period, these settlements will be disclosed permanently. All settlements more than $150,000 will also be disclosed permanently.

(3) Current American Board of Specialty certification or board equivalent;

(4) Approved post-graduate training; and

(5) Completed investigations that have been referred to the Attorney General for the filing of an accusation.

However, the public is not protected by requiring these disclosures unless the Board is first able to obtain the information to be disclosed.

For this reason, the JLSRC further recommends that the following changes in law be made to ensure that the Board obtains the information it requires to implement a disclosure program:

(6) provide for penalties against medical malpractice insurers that fail to report malpractice settlements, judgments, and awards to the Board to match those placed on hospitals that fail to file an 805 Report – up to a $50,000 fine for a negligent failure to file, up to $100,000 for a willful failure to file;

(7) require plaintiff's lawyers to serve all complaints filed in medical malpractice actions on the Medical Board and that those legal complaints be treated as complaints from patients for Medical Board purposes; and

(8) re-define the word "judgment" in current law so that all judgments are to be reported, including those judgments vacated as a part of a settlement between the parties, and to ensure that judgments against medical corporations controlled by a physician whose actions led to the judgment are reported as a judgment based on the acts of the physician.

Finally, the Board's recent efforts to disclose records pursuant to a Public Records Act request has been blocked by a lawsuit. The grounds of the lawsuit are in part based upon alleged conflicts and ambiguities between the Public Records Act and the statutes that govern Medical Board disclosure.

To prevent future lawsuits from blocking Board efforts at disclosure, and to clarify that statutes relating to Medical Board disclosures about individual physicians serve a different public policy purpose than the good government aims of the Public Records Act, the JLSRC recommends:

(9) legislation to clean-up conflicts between the B&P Code and the Public Records Act, to permit the disclosures above and clarify that the B&P Code complements, but does not over-ride, the Act.

Comments: It cannot be disputed that physicians who are practicing below the accepted standard of care pose a risk to public health. Thus, it is the chief responsibility of the Board is to protect the public from these physicians. That is why the Board was created and why physicians are licensed. One way that the Board fulfills its public protection function is by disclosing information about physicians to inquiring members of the public.

Problems with the Medical Board's Current Disclosure Program Widely Reported. As three major newspapers (The San Francisco Chronicle, the Orange County Register, and the San Diego Union-Tribune) in just the last year have uncovered, a diligent patient wanting to check on his or her physician by using the Board's web site will find that their physician is given a clean bill of health, even where the physician has paid millions of dollars in repeated malpractice settlements, is about to be formally charged by the Board, and even if the physician has a relevant misdemeanor criminal history.

Poor Public Disclosure Is Worse Than No Public Disclosure. A public program of disclosure that purports to provide information a patient might find relevant about the history and record of a physician, but which for whatever reason falls short, is worse than no disclosure program at all. An inadequate program leads a diligent patient into erroneously believing that their physician was trouble-free, when the physician may in fact have an extensive record of problems. An inadequate program of public disclosure leads a patient into an incorrect belief that no further investigation of their physician is warranted.

As well, by failing to distinguish between physicians who have troublesome histories and those that do not, the Board's current disclosure program, including its web site, distorts the market in favor of potentially dangerous physicians and away from lower-risk, competent ones.

What The Board Discloses Now.

- If the individual is licensed in California as a physician.
- The physician's address of record.
- The date a physician's license was issued, and the date it will expire if not renewed.
- The medical school a physician graduated from, and year of graduation.
- The status of a physician's license, e.g., renewed/current, revoked, retired, etc.
- If a physician has been formally accused of wrongdoing by the Medical Board.
- If a physician has been "disciplined" by the Medical Board of California or the medical board of another state.
- If a physician has been convicted of a felony, reported to the Board after January 3, 1991.
- Malpractice judgments or arbitration awards of any amount are reported to the Board after January 1, 1993.
- Any hospital disciplinary actions that resulted in the termination or revocation of a physician's hospital staff privileges for a reason related to patient care reported to the Board after January 1, 1995. The Board is also allowed to disclose limitations on hospital privileges if the Board orders it.

Four Reasons Why The Board's Public Disclosure Program Has Been Criticized. There are four reasons why the Medical Board's disclosures misinform patients about the records of California doctors.

1. **Too few meaningful categories of information.** As detailed in the news articles, the Board does not feel it has the legal authority to disclose some of the categories of information every hospital, HMO, and medical malpractice insurer wants to and does know – convictions substantially relevant to the practice of medicine (including misdemeanor convictions) and medical malpractice settlements.

2. Narrow interpretations of current disclosure statutes. Where the Board does feel it has the authority to disclose certain information, the Board construes that authority narrowly. For example, current law provides that medical malpractice "judgments" shall be disclosed. But, under the Board's interpretation, if a physician loses a lawsuit, judgment is entered, but then the lawsuit is settled and the parties (now with their private interests aligned) succeed in having the judgment vacated by a judge as a condition of their settlement, the Board will not disclose the judgment.

3. Those who are legally required to report to the Board do not. Those who by law are required to report certain information to the Board are not doing so. Pursuant to B&P Code Section 805, hospitals are required to inform the Board of restrictions they place on doctor privileges. Many studies have shown that hospitals have not been sending such reports, despite their legal requirement to do so. To address this essential failure of California's physician regulatory scheme, last year, the Governor signed SB 16 (Figueroa) which, in part raised the fines for failing to file such "805" Reports; up to $50,000 for a negligent failure to file, up to $100,000 for a willful failure to file.

Medical malpractice insurers too are required to report pay-outs on medical malpractice settlements, awards and judgments. Apparently, as The San Francisco Chronicle and the Orange County Register found, they are not always doing so. There is currently no penalty akin to those placed on hospitals for an insurer's failure to abide by this legal requirement.

4. The Board rarely initiates an investigation unless it receives a formal complaint. The Board appears to wait for complaints to come to it. With one exception (Jury Verdicts Weekly), the Board does not, for example, on its own, survey legal periodicals to see if action is an investigation is warranted even if a patient fails to complain. Apparently, even a malpractice judgment so large as to result in news headlines would not certainly spark a Board investigation unless the plaintiff also remembered to write or call the Board to complain.

Both the Board's sub-committee on public disclosure and the Federation of State Medical Boards supports disclosure of medical malpractice settlements and all criminal convictions substantially related to the practice of medicine. The Board's sub-committee also favors disclosing when a referral is made to the Attorney General for the Attorney General to file an accusation.

Summary of recommendations: The (1) through (5) recommendations summarized above track exactly the recommendations of the Board's own sub committee on disclosure. They

confront and improve each of these reasons why the Board's disclosures misinform rather than inform. The recommendations provide the public with the basic categories of information every HMO, hospital and medical malpractice insurer believes is relevant and, to some degree, requires as a condition of contracting with a physician. The recommendations also mandate that any medical malpractice-related disclosures be accompanied by explanations that are used in many other states, so that patients are informed about what the disclosures mean, and what they do not mean. The recommendations finally seek to ensure that the Board has delivered to it the information it needs to identify potentially dangerous physicians and seek to clarify the relationship between the Public Records Act's broad provisions aimed at transparency in government, with the Medical Board's disclosure program, aimed at better informing individual patients about their choice of physician.

ISSUE #4. (CHANGE BOARD COMPOSITION?) Should the current composition and make-up of the Board, with 12 physicians and 7 public members, be changed?

Recommendation #4: The Joint Committee recommends increasing the Board by two public members that should be assigned to the Division of Medical Quality. The Board would then consist of twelve physicians and nine public members. The Division of Medical Quality shall consist of fourteen members of the board, six of whom shall be public members.

Comments: Requiring closer parity between public and professional members is consistent with both this Committee's and the Department's recommendations regarding other health-related boards that have undergone sunset review.

The Board currently consists of 19 members: 12 professional members and 7 public members. The majority of the boards under the purview of the Department have a more balanced composition of professional and public members. Unlike these other boards, the Board has almost a two-to-one ratio of professional to public members. It has been argued that this professional "super majority" necessarily results in professional bias, and less focus on consumer protection.

Public participation on regulatory boards ensures a balanced approach to decision-making, and enhances public protection. In recent years, the JLSRC has expanded the number of public members on DCA regulatory boards. Public members have been added to the Accountancy, Contractors, Pharmacy, Podiatry, Psychology, Respiratory Care, and Veterinary Medical Boards through sunset review legislation, and the JLSRC recently recommended the both the Chiropractic Board and the Optometry Board have increased public membership.

If the Board is continued, the JLSRC recommends increasing the number of public members on the Board to a total of nine public members. The new public members should serve on the Division of Medical Quality which has primary responsibility for reviewing disciplinary actions taken against physicians. This new composition would provide sufficient membership so that the two panels of the Division (composed of seven members each) can sufficiently meet the 4 member quorum requirement and thus ensure disciplinary actions are implemented immediately.

It will also provide more consumer representation while continuing to maintain the expertise needed for technical regulatory and enforcement issues handled by this Division and the Board.

ISSUE #5. (CONTINUE REGULATION OF THE PROFESSION AND THE BOARD?)

Should the licensing and regulation of physicians and surgeons be continued, and the professions be regulated by an independent medical board rather than by a bureau under the Department?

Recommendation #5: Physicians and surgeons should continue to be regulated by the Medical Board of California, but the Board should report to the JLSRC at the next scheduled JLSRC meeting on its progress in implementing these recommendations, and that the sunset date for the Board be extended to July 1, 2005, so that the JLSRC and the Department can review and implement recommendations of the Enforcement Monitor.

Comments: There have been concerns raised about the Board's current enforcement program. This includes, the length of the Board's disciplinary process, the amount of investigations and disciplinary actions taken by the Board, and the dissatisfaction consumers have expressed with the Board's handling of their complaints.

However, the Department has indicated that it continues to find the Board responsive to requests for information and recommended policies. The Board has assumed a leadership position on the Task Force on Culturally and Linguistically Competent Physicians and Dentists, and in Department discussions of consumer complaint disclosure. The Board has attended Department sponsored hearings and convened a committee of the Board, the Public Information Disclosure Committee, to discuss the issue and receive testimony from interested members of the public. A sub committee of the Board recently modified its historical position on public disclosure of information relating to consumer experience with physicians by agreeing to release summary information of malpractice settlements that have been filed with the Board, redacting the patient's and plaintiff's names to protect their privacy.

Continued regulation of the profession is critical and consumers must be able to rely upon appropriate regulatory oversight of this profession to ensure that practicing physicians and surgeons are well trained and maintain a license in good standing, and that physicians are held accountable if they do not provide appropriate health care and treatment for their patients. For this reason, the Board should be closely monitored over next few years by both the JLSRC and the Department to assure it is fulfilling its consumer protection mission.